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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 56.

THE ATLANTIC REFINING COMPANY, owner of the Tank Steamship "Bohemian Club",

Petitioner,

—against—

A. P. MØLLER, claimant of the M/V "Laura Maersk",

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR REHEARING.

LEONARD J. MATTESON,
Counsel for Respondent, A. P. Moller, Claimant of the Motor Vessel "Laura Maersk".

J. HARRY LA BRUM,
LEONARD J. MATTESON,
Counsel for Respondent.

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Petition for Rehearing.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The respondent, A. P. Moller, claimant of the Motor Vessel "Laura Maersk", respectfully presents this, its petition for rehearing in the above entitled cause, and in support thereof submits the following:

This court, by its decision dated December 20, 1943, reversed the judgment of the Circuit Court of Appeals in this case which, in turn, had modified the decision of the District Court.

The Decisions of the Lower Courts.

The District Court had held that the "Bohemian Club" was without fault in anchoring on the eastern side of the upper end of Bulkhead Bar Range at 7:41 A. M. (Con. 1, R. 100) and that those in charge of that vessel were justified in moving her shortly after 10 A. M. (actually 10:13 A. M., see Fdg. 14, R. 93), when the fog cleared, and in anchoring her again at 10:18, when the fog again obscured *indicia* of her position (Con. 2, R. 100).

The District Court found as a fact that in her second location the "Bohemian Club" was located in the channel with her bow approximately on the Bulkhead Bar Range line and her stern tailing to the westward thereof (Fdg. 21, R. 94) and that in this position she was "anchored in such a manner as to present an obstruction to the free passage of other vessels, particularly ones approaching from the other range" (Fdg. 24, R. 94). This finding was accepted by the Circuit Court of Appeals (R. 105, 107).

Neither the Circuit Court of Appeals nor the District Court found that the "Bohemian Club's" first anchorage similarly offended (R. 116).

The reason the District Court considered that the "Bohemian Club" was justified in shifting her position from one of comparative safety at the easterly edge of the channel to a position where she obstructed "the free passage of other vessels, particularly ones approaching from the other range", appears in that portion of the findings of the District Court headed "Discussion" where the court said:

> "When at 10:00 or shortly thereafter the fog disappeared sufficiently for the Buoy 2D to be seen, the master of the 'Bohemian Club' concluded that she was in such a position that a change in the tide

from ebb to flood would result in her fouling the buoy" (R. 97).

The majority of the Circuit Court of Appeals did not differ from the District Court on any question of law. Both recognized that the Act of March 3, 1899, Ch. 425 15, 30 Stat. 1152, 33 U. S. C. A. 409, forbidding vessels to anchor in navigable channels so as to obstruct the passage of other vessels is a "limited restraint rather than absolute or complete prohibition" (R. 107), *i. e.*, that a violation may be justified by necessity.*

The difference of opinion between the Circuit Court of Appeals and the District Court was solely on the question as to whether there was sufficient justification in the facts and circumstances of the case for the action of the master of the "Bohemian Club" in shifting his position from an anchorage at the edge of the channel, where neither court found that the "Bohemian Club" prevented or obstructed the passage of other vessels or craft, to a position athwart the range line, and failing to the westward thereof, which both courts found obstructed the passage of other vessels generally and particularly those bound down, as was the "Laura Maersk".

The majority of the Circuit Court of Appeals did not consider the possibility that the "Bohemian Club" might foul the buoy some two hours later (actually five hours**) a sufficiently imminent or serious danger to justify the action of the master of the "Bohemian Club" in shifting his vessel to a position where she obstructed the passage

* This Court pointed out that the Circuit Court of Appeals recognized that the duty imposed by Section 15 is "not absolute" (Opinion, p. 3).

** See footnote *infra*, p. 10.

of other vessels, particularly those bound down. They said on rehearing:

> "It is true that the later discovered presence of a buoy near at hand to the anchorage first made by the 'Bohemian Club', plus a belief that the turn of the tide in about two hours would possibly bring the ship in contact with the buoy, presented a problem to the master of the vessel. It is also true that the master, and not a reviewing judge, was then and there in command and had the responsibility of making a decision as to the proper course of action in the circumstances, for which decision liability is not to be imposed for mere error in judgment. But it is equally our duty to pass upon that conduct afterwards, when the matter has become the subject of litigation, and to decide whether, in our judgment, what was done was done in the exercise of due care" (R. 116).

The Decision of This Court.

In reversing the decision of the Circuit Court of Appeals, this Court said that, when the fog enveloped the "Bohemian Club" for *the second time*, the least dangerous course was to anchor on the west side of the channel, and that—

> "Under a proper construction of Section 15, therefore, the circumstances which necessitated both the first and second anchorings of the 'Bohemian Club' were equally sufficient to warrant an exception to the duty which it [Sect. 15] requires" (Opinion, p. 4).

This Court therefore concluded:

> "Whether the act of lifting anchor and moving to

the western part of the channel to avoid the danger of the buoy constituted negligence is a question wholly outside Section 15" (Opinion, p. 4).

THE DECISION OF THIS COURT CONTAINS BROAD IMPLICATIONS AND MAY BE INTERPRETED TO LAY DOWN A DANGEROUS AND UNSOUND RULE.

In basing its decision on this ground, we submit that this Court has laid down a dangerous and unsound rule. The effect of the decision is that, even though it be assumed that it was negligent for the master of the "Bohemian Club" to lift anchor and move to the western part of the channel, the "Bohemian Club" is, nevertheless, to be exonerated from fault since the actual anchoring of the vessel the second time was made necessary by the fog. The rule laid down by the Court will justify a vessel in anchoring under compulsion of fog in a position obstructing a navigable channel, no matter how serious the obstruction, no matter how little care she may have used in reaching or selecting such position, and no matter how negligent she may have been in embarking on the navigation producing this result. The rule will justify a vessel in leaving her pier in dense fog, entering a navigable channel, and anchoring in a position to obstruct seriously the passage of other vessels, even though the result could, and should, have been foreseen from the time she left her pier*; that is substantially this case.

* In the case of *The Georgia*, 208 Fed. 635 (D. C. R. I.) the S. S. "Seaconnet" was held at fault for anchoring in the channel in foggy weather on the ground that she should have stayed in port until the weather cleared.

THE UNCONTRADICTED EVIDENCE APPEARING IN THE RECORD SHOWS THAT THERE WAS EVERY REASON FOR THE MASTER OF THE "BOHEMIAN CLUB" TO ANTICIPATE THAT SOUTHBOUND TRAFFIC WOULD BE HEAVIER THAN NORTHBOUND TRAFFIC WHICH UNDER THE CONDITIONS WAS NON-EXISTENT AND CONSEQUENTLY THAT DANGER OF COLLISION WOULD BE GREATLY INCREASED BY SHIFTING THE POSITION OF THE "BOHEMIAN CLUB". THIS COURT HAS OVERLOOKED THE UNDISPUTED FACTS WHICH CLEARLY APPEAR.

The "Bohemian Club" left an anchorage at the easterly edge of the channel where she had been safely anchored from 7:41 A. M. to 10:13 A. M., more than 2½ hours (Fdgs. 8 and 14, R. 93). No upbound vessels passed or attempted to pass the "Bohemian Club" during this period or thereafter prior to the collision (R. 7). Moreover, the evidence shows that vessels bound upstream below Buoy 2-D were similarly fog-bound by the dense fog. They had anchored and were heard by the master ringing their bells astern of the "Bohemian Club" (R. 7). The fog above Buoy 2-D was only intermittent (Fdg. 28, R. 95). Only downbound vessels were proceeding at the time.

While the "Bohemian Club" lay in her first anchored position, she was passed by three downbound vessels (R. 104). These downbound vessels passed the "Bohemian Club" between 9:45 and 10 A. M., just before she shifted her position at 10:13 A. M. (R. 7). They passed about 200 feet off on her port side (R. 7, 15).

The downbound vessels which passed the "Bohemian Club" were all proceeding almost precisely on the range line, and on the course later taken by the "Laura Maersk". This appears from the fact that the "Bohemian Club" in her original position was anchored about 150 feet from the buoy, tailing to the westward (Fdgs. 9, 10, R. 93).

Taking into account her width and her angling position and the fact that the range line is located 400 feet west of the easterly boundary of the channel (Edg. 11, R. 93), it is apparent that the three downbound vessels which passed 200 feet off on her port side were proceeding almost precisely on the range line, as was also the "Laura Maersk" at the time of the collision.

It therefore appears that in shifting her position the "Bohemian Club" anchored the second time precisely in the track which her master had reason to know was being utilized by southbound vessels, the only vessels which were moving under the conditions prevailing.

This Court said in its opinion (p. 2):

> "There are no findings that the Master of the 'Bohemian Club' had any reason to believe that his vessel constituted a more dangerous obstruction to river traffic in general in her second position than in her original position."

And in the footnote to this passage, this Court commented as follows:

> "The opinion of the Circuit Court emphasizes the fact that the 'Bohemian Club' did not obstruct south bound traffic in her first position but did obstruct this traffic in her second position. Since, however, the 'Bohemian Club' obstructed the north bound traffic in her first position, this fact could not be material unless there was evidence that her Master should have anticipated that the volume of south bound traffic would be heavier than that of north bound traffic. No finding on this question is disclosed by the record."

We submit that it was clearly in the minds of the majority of the Circuit Court of Appeals that the "Bohemian Club" in her second position constituted a more dangerous obstruction to river traffic, although no specific finding was made by the Court on this point. The undisputed facts appearing clearly in the record show that this was true.

The testimony of the master of the "Bohemian Club" himself shows that he "should have anticipated that the volume of southbound traffic would be heavier than that of northbound traffic". He specifically testified that the only vessels which passed him while he was anchored were the three downbound vessels (R. 7). On his own testimony there was no reason to anticipate any upbound traffic, not only for the reason that there had been none, but because of the fact to which he testified, that he could hear the bells of upbound ships anchored astern of him in the dense fog which prevailed in the section of the river below the position where he was anchored (R. 7).

We submit, therefore, that this Court has misapprehended the uncontradicted facts shown by the record. *The decision of the Circuit Court of Appeals should not be reversed, when it is supported by the uncontradicted facts shown by the record, merely because that Court failed to refer specifically to those facts in support of its conclusions, especially when the consideration of those facts is implicit in its discussion and conclusions.*

The statement by this Court in footnote 3 on p. 2 of its opinion seems to indicate that this Court would have taken a different view of the matter and reached a different conclusion if it had been brought to the Court's attention that—

> "there was evidence that her ('Bohemian Club's') Master should have anticipated that the volume of

> southbound traffic would be heavier than that of northbound traffic."

The uncontradicted evidence shows this to have been the fact. If, in the heat of argument, counsel failed to bring this fact to the attention of the Court, it would, nevertheless, be a grave miscarriage of justice if the decision, based on a misapprehension of the facts, should stand, when the result may be corrected by further consideration on reargument.

We sincerely doubt, moreover, whether the Court intended by its decision to lay down a rule of such broad implications as seem to flow from the Court's conclusion discussed above (*supra*, p. 5) that—

> "Whether the act of lifting anchor and moving to the western part of the channel to avoid the danger of the buoy constituted negligence is a question wholly outside Section 15" (Opinion, p. 4).

We believe that in any event this Court will wish to clarify its position on this point.

We submit that the decision of the Circuit Court of Appeals was fully justified by the following considerations and should not be reversed:

1. While the "Bohemian Club" lay in her first anchorage on the easterly side of the channel for 2½ hours from 7:41 A. M. to 10:13 A. M., no upbound vessels passed or attempted to pass (R. 7).

2. During this period the fog was dense and other upbound vessels astern of the "Bohemian Club" had anchored and were heard ringing their bells (R. 7).

3. During this period and shortly before 10 A. M., three downbound vessels were seen to pass the

"Bohemian Club" about 200 feet on her port hand proceeding down the channel approximately on the range line (R. 7).

4. The sole reason given by the master of the "Bohemian Club" for shifting his anchorage at 10:13 A. M. was the supposed danger of fouling Buoy 2-D when the tide turned (R. 2, 3, 10, 11). This supposed danger was neither serious nor imminent:

   (a) The change of tide was not imminent. The change of tide from ebb to flood would not have occurred less than two, and actually not until about five hours later.*

   (b) For a ship the size of the "Bohemian Club" (6,906 gross tons official registry), to drift into contact with a moored channel buoy could, in no event, have been a serious matter since the buoy is not a fixed structure, but a comparatively small floating object, moored in place with scope of chain, and consequently capable of being pushed aside.

   (c) Contact could be in any event have been avoided by use of the ship's engines (see master's testimony, R. 85).

Under these conditions the "Bohemian Club's" first position was a safe anchorage and both the Courts below carefully refrained from finding otherwise.

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* The District Court's finding was "approximately two hours later" (Finding 13, R. 93). The master's testimony was "about three hours later" (R. 3). Since the change from flood to ebb occurred, according to the master's testimony, about 9:10 A. M. (R. 88), the change from ebb to flood would not have occurred less than six hours later, *i. e.* not before 3 P. M.

Under these circumstances, we submit that the majority of the Circuit Court of Appeals was fully justified in saying in its original opinion:

> "In the present instance, when the fog had lifted somewhat around 10 A. M., the master of the 'Bohemian Club' found that his vessel was anchored on the easterly side of the channel near the bend as determined by the intersecting range courses. That was plain from her position with relation to buoy 2-D which had become visible. The master also knew that, while the tanker had been so anchored for more than two hours, three vessels proceeding downstream around the turn opposite buoy 2-D had passed in safety. Yet, merely to avoid the possibility of fouling the buoy, when his vessel would swing round on the turn of the tide, he lifted anchor and maneuvered his boat in weather so unsettled that within five minutes after lifting anchor and when, because of the density of the redescending fog, he no longer knew where he was, he found it necessary again to drop anchor. As a consequence, the tanker was farther out in the channel with her bow on the Bulkhead Bar Range course and her stern tailing off to the west of the course—a position particularly obstructive to vessels proceeding (fol. 12) downstream and required to make the swing to the left in turning from the Deepwater Point Range. The master having deliberately lain his vessel open to the peril which caused him to violate a statutory rule, may not then point to the fog for legal justification of his conduct and particularly not, when he is unable to show that his vessel's position neither prevented nor obstructed the passage of other boats in the channel" (R. 109)

and was equally justified in saying upon reargument:

> "It may be conceded that when the 'Bohemian Club' first anchored at 7:41 A. M. on the eastern side of the channel, being then unable to proceed because of the density of the fog, her action in such circumstances did not incur liability-creating possibilities. But it is quite another thing to say that, because the anchorage first taken, out of necessity, would not have furnished a basis of liability, the ship may thereafter lift anchor and maneuver about in the channel, while still obscured by fog, in the hope of finding a supposed better anchorage and then, because of the fog, anchor in the channel without knowledge of her position and in a manner so as to prevent or obstruct the passage of other vessels or craft, and still not be subject to a charge of negligence. To so hold would be to impose a hazard upon navigation which no decided case has yet done and which we do not think would comport with the intendment of the law. See Act of March 3, 1899, c. 425 § 15, 30 Stat. 1152, 33 U. S. C. A. 409" (R. 115-116).

In view of these facts, we submit that the decision of the Circuit Court of Appeals was not in any sense a violation of accepted interpretations of the Act of March 3, 1899.

THE PETITION FOR CERTIORARI WAS GRANTED BECAUSE OF AN ALLEGED CONFLICT AMONG THE CIRCUITS. SINCE NO SUCH CONFLICT APPEARS THE PETITION SHOULD BE DISMISSED.

As stated in the opinion, this Court—

> "granted certiorari because of *an alleged conflict*

among the Circuits as to the proper interpretation to be given this Act" (emphasis ours, Opinion, pp. 1-2).

No conflict in the interpretation of the Act among the Circuits has appeared upon the argument or in the discussion of this case. The decision of this case involves solely a question of fact as to whether under the circumstances and conditions the master of the "Bohemian Club" was justified in shifting the position of his vessel from a safe anchorage to one which obstructed traffic which was known to be moving at the time, and consequently whether the defense of necessity is open to him in respect to his violation of the express provisions of Section 15 of the Act of March 3, 1899.

Since the "alleged conflict among the Circuits" failed to appear upon the argument and consideration of this case, we submit that the petition for certiorari in any event should be dismissed.

WHEREFORE, the respondent, A. P. Moller, claimant of the motorvessel "Laura Maersk", respectfully prays that this petition for a rehearing be granted, and that upon further consideration the judgment of the Circuit Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

A. P. MOLLER, Respondent,
Claimant of the Motorvessel
"Laura Maersk",
By LEONARD J. MATTESON,
Counsel.

J. HARRY LA BRUM,
LEONARD J. MATTESON,
Counsel for Respondent.

Certificate of Counsel.

I, Leonard J. Matteson, counsel for the above named petitioner, do hereby certify that the foregoing petition and application is presented in good faith and not for delay.

LEONARD J. MATTESON,
Counsel for Respondent, A. P. Moller,
Claimant of the Motor Vessel "Laura Maersk".

p. 3.

SUPREME COURT OF THE UNITED STATES.

No. 56.—October Term, 1943.

The Atlantic Refining Company, Owner of the Tank Steamship "Bohemian Club", Petitioner, *vs.* A. P. Moller, Claimant of the Motor-Vessel "Laura Maersk".	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 20, 1943.]

Mr. Justice Black delivered the opinion of the Court.

While lying at anchor in the channel of the Delaware River the tanker "Bohemian Club", owned by the petitioner, was struck by the motor vessel "Laura Maersk", owned by the respondent. Damage to each vessel resulted, for which the respective owners sought recovery in this admiralty proceeding. The District Court found that the collision was caused by the excessive rate of speed at which the "Laura Maersk" was proceeding down the channel, rendered judgment for the full amount of damages inflicted upon the "Bohemian Club", and dismissed the cross-libel of respondent against the "Bohemian Club." The Circuit Court of Appeals approved the District Court's finding that the "Laura Maersk" was negligent but concluded, with one judge dissenting, that the "Bohemian Club" was also negligent, and reversed with directions that the rule of divided damages be applied. See *The Schooner Catharine* v. *Dickinson*, 58 U. S. 170, 177-178; *The "North Star"*, 106 U. S. 17, 20. The Circuit Court's conclusion that the "Bohemian Club" was negligent rested upon its interpretation of the following portion of Section 15 of an Act of March 3, 1899: "It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft."[1] We granted certiorari

[1] 30 Stat. 1152; U. S. C. Title 33, § 409. The Act imposes penal sanctions for violations of Section 15. See §§ 16-18. However this Section has been interpreted as establishing a standard of care applicable in ordinary negligence actions for damages. See Otto Marmet Coal and M. Co. v. Fieger-Austin Dredging Company, 259 F. 435; The William C. Atwater, 110 F. 2d 644; The Southern Cross, 93 F. 2d 297.

because of an alleged conflict among the circuits as to the proper interpretation to be given this Act.[2]

The findings of both courts show that the accident happened under the following circumstances. At about 7:30 A.M. the "Bohemian Club", 435 feet long, was proceeding northward on the east side of the channel of the Delaware River when she encountered a dense fog. Unable to move without endangering herself and other vessels, and unable to obtain anchorage within a distance of five miles, she dropped anchor along her course in the channel. At this point the channel was approximately 1200 feet wide, and northbound vessels were required to use the 400 feet adjacent to the channel's eastern boundary. Under the circumstances, the safest course of conduct for the "Bohemian Club" was to anchor where it did. About 10 A.M. the fog lifted slightly and the Master discovered a large steel buoy about 150 feet to the northeast of the vessel. The tide was then ebb, and was flowing away from the buoy, but was due to change to flood shortly. Fearing that this change might cause the vessel to foul the buoy, the Master had the anchor lifted, the engines put slow ahead, and the rudder put hard right. In less than five minutes, however, the fog again dropped, and the vessel was again anchored. This time, apparently because she had been carried by the tide, the "Bohemian Club" lay somewhat south and west of her original position so that she partially obstructed the western part of the channel used by southbound vessels. There was, however, ample room in the western part of the channel for a southbound vessel to pass the "Bohemian Club"; in fact, since the western part of the channel was twice as wide as the eastern part, there was more space for southbound vessels to pass than there had been for northbound vessels to pass when the "Bohemian Club" was anchored in the eastern part of the channel. There are no findings that the Master of the "Bohemian Club" had any reason to believe that his vessel constituted a more dangerous obstruction to river traffic in general[3] in

[2] See, for example, The City of Norfolk, 266 F. 641; The A. P. Skidmore, 115 F. 791; The Socony No. 9, 74 F. 2d 233.

[3] The opinion of the Circuit Court emphasizes the fact that the "Bohemian Club" did not obstruct southbound traffic in her first position but did obstruct this traffic in her second position. Since, however, the "Bohemian Club" obstructed the northbound traffic in her first position, this fact could not be material unless there was evidence that her Master should have anticipated that the volume of southbound traffic would be heavier than that of northbound traffic. No finding on this question is disclosed by the record.

her second position than in her original position. In compliance with the statutory requirement imposed on vessels which are compelled to anchor in the fog, the "Bohemian Club's" fog bell was rung rapidly for five seconds at minute intervals;[4] and, in addition, lookouts were stationed on the bridge and forecastle. Despite these precautions the "Laura Maersk", southbound at what both courts agreed was an unreasonable speed, crashed into the "Bohemian Club" about fifteen minutes after she anchored the second time.

The question for decision is whether the Circuit Court correctly held that the action of the "Bohemian Club" in anchoring in the channel at the point of the collision was unlawful under Section 15 of the Act of March 3, 1899. The command of Section 15 forbidding vessels to "anchor . . . in navigable channels" has uniformly been interpreted not to be absolute.[5] An exception to the duty required by this section has been recognized where literal compliance with its terms would create a danger to navigation which could be avoided or reduced by violation of its terms. See *The Socony No. 9*, 74 F. 2d 233, 234. As a practical matter an opposite construction would defeat the plain purpose of Section 15 to maintain and promote the safety of navigation. It would, in addition, be out of harmony with Article 27 of the general Navigation Rules for Harbors, Rivers, and Inland Waters, which requires that "in obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the . . . rules necessary in order to avoid immediate danger."[6] Cf. *The Cayuga*, 81 U. S. 270, 275, 276. Furthermore Article 15 of these general Rules, above referred to, contemplated that under some circumstances vessels may be compelled to anchor in foggy weather, and prescribed sound signals which vessels so anchored must use.

In the instant case the Circuit Court of Appeals recognized that the duty imposed by Section 15 is not absolute and held that, under the circumstances, the act of the "Bohemian Club" in anchoring on the east side of the channel was lawful. The Court

[4] Article 15, Navigation Rules for Harbors, Rivers, and Inland Waters; 30 Stat. 99; U. S. C. Title 33, § 191(2)(d).

[5] The Europe, 190 F. 475, 479; The Caldy, 153 F. 837, 840; see also the cases cited in note 2, *supra*.

[6] 30 Stat. 102, U. S. C. Title 33, § 212.

felt compelled, however, to hold that the act of anchoring on the west side was unlawful under Section 15. We think this section does not require such a holding. Whether anchored on the east or the west side of the channel the "Bohemian Club" would, within the literal terms of the section, "obstruct the passage of other vessels." The District Court found that when the fog enveloped the "Bohemian Club" for the second time, "the least dangerous course" was to anchor on the west side of the channel; and this finding was not disturbed by the Circuit Court. Under a proper construction of Section 15, therefore, the circumstances which necessitated both the first and second anchorings of the "Bohemian Club" were equally sufficient to warrant an exception to the duty which it requires. Whether the act of lifting anchor and moving to the western part of the channel to avoid the danger of the buoy constituted negligence is a question wholly outside Section 15. Since the holding of the Circuit Court rested upon an erroneous interpretation and application of this section, its judgment must be reversed.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.